IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeals No. 413, 414, 455, 456 of 2003 and 423 of 2004

Judgment reserved on 12.3.2007

Date of decision

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1. **Sonu Kumar vs. State of H.P. & ors.**
2. **Bal Krishan vs. State of H.P. & ors.**
3. **Arjun Singh vs. State of H.P.**
4. **Kamlesh vs. State of H.P.**
5. **Suresh Kumar vs. State of H.P.**

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The Hon'ble Mr. Justice : Surjit Singh, Judge.
The Hon'ble Mr. Justice : Dev Darshan Sud, Judge

Whether approved for reporting?

For the appellants: **Mr. R.K. Gutam, Sr. Advocate, with Mr. Naveen Bhardwaj, Advocate (in Cr.A. Nos. 413, 414, 455 & 456), Mr. Neeraj Sharma, Advocate, vice Mr. Jagdish Vats, Advocate (in Cr.A. Nos. 413 and 414 of 2003) and Mr. Praneet Gupta, Advocate, (in Cr.A. No. 423 of 2004).**

For the respondent : State **Mr. S.D. Vasudeva, Addl. Advocate General, with Mr. D.S. Nainta, Dy. A.G.**

Surjit Singh, Judge

These five appeals are being disposed of together, as they arise out of one judgment, whereby appellants in all the five appeals stand convicted of offences, under Sections 452, 323 read with Section

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Whether the reporters of Local Papers may be allowed to see the Judgment?

34 and Section 376 (g) of the Indian Penal Code. Each of the five appellants has been awarded the following sentences for the aforesaid offences:-

(a)	U/S 452, I.P.C.	Rigorous imprisonment for one year and fine of Rs.2,000/-.	In default of payment of fine to further imprisonment for six months.
(b)	U/S 323, IPC.	Simple imprisonment for six months.	
(c)	U/S 376(g), IPC.	Rigorous imprisonment for ten years and fine of Rs.5,000/-.	-do-

2. First the prosecution version may be noticed. The prosecutrix, aged 32 years, was married to a man, who was employed at a butcher's shop at Baijnath. Her husband fell ill and was perhaps rendered incapable of doing the job with the butcher. The prosecutrix approached the butcher for employing her son, who was then aged just eleven years, for doing odd jobs. The butcher offered to employ her son for grazing his sheep and goats on monthly salary of Rs.700/-. On 3.6.2002 the prosecutrix took her son to the butcher's shop at Baijnath with the intention of leaving him there. Her son was required to take the sheep and goats to the forest by the employer immediately after they reached. The prosecutrix accompanied her son to the forest. They returned with the herd around five or six in the evening. By then the last bus going towards the village of the prosecutrix, had already left. The butcher offered that she could stay with her son in the upper storey of the shop for the night. She accepted the offer. Around 9.30 p.m., when the prosecutrix and her son were sitting in the room on the upper storey of the shop of the butcher, appellants Kamlesh, Arjun Singh and Suresh Kumar went there. They forcibly

dragged the prosecutrix out of that room and when they reached the ground floor of the structure, two other appellants, namely Bal Krishan and Sonu joined them. One more person, named Chuni Lal, who too was tried along-with the appellants, also joined them. The prosecutrix was forcibly carried to a nearby forest. She cried for help. One old lady, living nearby intervened, but she could not get her released. The son of the prosecutrix got so scared that he climbed a truck parked nearby and hid himself in the tool-box. Some-one informed the police telephonically. Soon the police reached the forest and over-powered two of the appellants, namely Kamlesh and Suresh and the sixth accomplice of the appellants, named Chuni Lal (who stands acquitted by the trial Court), when they tried to flee from the spot on seeing the police. Statement of the prosecutrix was recorded by HC Pawan Sharma, heading the police party that reached the spot. The prosecutrix besides narrating the details about her visit to Baijnath and having gone to the upper storey of the shop of the butcher for night stay and having then dragged and taken to the forest in the manner as summarised hereinabove, stated that those who committed the rape, were calling each other by the names of Bal Krishan, Arjun, Sonu, Kamlesh etc.

3. Police investigated the matter and filed the case against the present appellants and their acquitted accomplice Chuni Lal. The trial Court charged all the six for offences, under Sections 452 read with Section 34, 323 read with Section 34, 376 (g) of the Indian Penal Code and Section 3 (x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, because the prosecutrix was alleged to belong to a scheduled caste. All the accused pleaded not guilty to the charge. The trial Court then proceeded to try the case and ultimately convicted and sentenced the

present five appellants as aforesaid, but acquitted their sixth accomplice Chuni Lal.

4. Appellants' plea is that they were not involved in the crime and have been implicated just on suspicion. Learned counsel, representing the appellants, argued that there is no evidence on record establishing the identity of the appellants as the perpetrators of the crime.

5. Prosecution examined the prosecutrix as PW-1, her son Onkar Chand as PW-3, an old woman, named Gitan Devi, PW-4, who allegedly tried to get the prosecutrix rescued from the appellants, D.R. Thakur, PW-7, the then Judicial Magistrate Baijnath, who conducted the test identification parade, police Head Constable Pawan Sharma, PW-15, who on the receipt of telephonic information at the Police Station about the incident went to the spot and over-powered three of the alleged rapists on the spot and recorded the statement of the prosecutrix, under Section 154 of the Code of Criminal Procedure and ASI Chain Lal, PW-15 and Dy. S.P. Prittam Singh, PW-18, who conducted the investigation of the case. The police also examined lady doctor named, Bindu Sood, PW-19, who conducted the medicolegal examination of the prosecutrix and Dr. S.K. Sood, PW-2, who medically examined the appellants and their accomplice Chuni Lal with a view to ascertaining whether there were any injury marks on their persons and whether they were capable of performing sexual intercourse. All the five appellants took the plea of denial simpliciter and claimed that they were innocent and had been falsely implicated at the behest of the police.

6. The first submission made by the learned counsel for the appellants is that the evidence led by the prosecution with regard to the

identification parade is inadmissible inasmuch as the prosecutrix, while in the witness box, admitted that she had identified five boys at the Police Station on the morning of the next following day, that is to say on 4.6.2002, whereas the test identification parade was conducted on 8.6.2002, meaning thereby that five of the six accused had been shown to the prosecutrix, the identifier, before the test identification parade was conducted. We agree with this submission of the learned counsel and hold that the test identification parade conducted by PW-7 Shri D.R. Thakur has no evidentiary value. Also, the prosecutrix was unable to identify some of the accused at the identification parade and for this reason the evidence of test identification parade is not of much avail to the prosecution.

7. However, discarding of the aforesaid evidence regarding test identification parade does not by itself mean that the identity of the appellants does not stand established. The prosecutrix in her deposition as PW-1 very categorically stated that the perpetrators of the crime were calling each other by the names of Sonu, Bal Krishan, Arjun and Kamlesh. This part of her testimony is corroborated by the earliest version, which she gave to the police in the form of statement, under Section 154 of the Code of Criminal procedure, Ext. PA. No cross-examination was directed by the defence qua this part of the deposition of the prosecutrix. Therefore, there should be no reason to disbelieve this part of the testimony of the prosecutrix.

8. Learned counsel representing appellants Bal Krishan, Arjun, Sonu and Kamlesh urged that the testimony of the prosecutrix that the accused were calling each other by these names by itself would not

establish their identity, because there could have been other persons known by these names.

9. May be that there are other persons by these names living at or around Baijnath, where the incident had taken place, but the fact that during the course of the trial the prosecutrix and her son PW-3 again identified these four appellants among those who committed the crime, rules out the possibility of some other persons known by these very names being the perpetrators of the crime.

10. More-over the fact that one of these four persons, named in the FIR, was among the three persons, who were apprehended on the spot lends assurance that the persons named in the FIR were no different from the appellants.

11. It was also urged that the evidence on record was to the effect that all the accused had been arrested on the next following day and that the possibility of the names of four of the appellants having been incorporated in the FIR by the police on its own cannot be ruled out. The plea cannot be accepted. Even though three persons were apprehended on the spot by PW-15 HC Pawan Sharma and his party and the statement of the prosecutrix Ext. PA was recorded thereafter, names of two of the three apprehended persons, i.e. Suresh and Chuni Lal, do not figure in the FIR. If the Police Officer were acting with some bias, while recording the statement Ext. PA and incorporated the names of the alleged rapists on his own without any name having been disclosed to him by the prosecutrix, he could have very easily incorporated the names of all those three persons, whom he apprehended on the spot. As has already been noticed, the name of only one of these three persons finds mentioned. Non-figuring of

the names of the other two apprehended persons, namely Suresh and Chuni Lal by itself is a guarantee that the names were recorded in the FIR, as per statement made by the prosecutrix.

12. Then there is unflinching evidence in the form of testimony of HC Pawan Sharma, PW-15 and the son of the prosecutrix, PW-3 Onkar Chand that two of the appellants, namely Kamlesh and Suresh, along-with their acquitted accomplice Chuni Lal, had been apprehended on the spot. Name of Kamlesh figures among the accused, who were being called by their co-accused by names, while committing the crime.

13. The aforesaid evidence, in our considered view, establishes the identity of all the five appellants beyond any shadow of doubt.

14. Learned defence counsel drew the attention of the Court to some contradictions in the testimony of the prosecutrix as to the persons, who were present in the upper storey of the shop of the butcher, when she was allegedly dragged out and forcibly carried to the bushes. At one point the prosecutrix stated that the butcher himself and his servant, who was cooking meals, were present there, at another she stated that the butcher was not there, but his mother and sister were there. These contradictions are of little consequence, because they do not create any doubt about the identity of the appellants nor do they in any way dilute the evidence of the prosecution with regard to the charge of house trespass, hurt and gang rape.

15. Learned defence counsel then pointed out that the old lady, named Gitan Devi, PW-4, who allegedly unsuccessfully intervened to rescue the prosecutrix, did not support the prosecution version. They also drew the attention of the Court to the testimony of some other prosecution

witnesses, who turned hostile. All these witnesses stand contradicted by the statements, which they made to the police during the investigation. They were duly confronted with such statements. Therefore, defence cannot derive any benefit from the fact that the above-named old lady and some other witnesses of the prosecution have turned hostile.

16. Testimony of the prosecutrix and her son is corroborated by the testimony of PW-15 HC Pawan Sharma, who reached the spot within half-an-hour or so of the commencement of the shameful incident and apprehended three persons on the spot, out of whom two were appellants Kamlesh and Suresh. This witness has testified that he saw the lower part of the body of the prosecutrix naked in the bushes. There is no valid reason for disbelieving the testimony of this witness.

17. Under these circumstances, non-corroboration of the testimony of the prosecutrix and her son by PW-4 Gitan Devi and some other witnesses living in the locality does not come to the rescue of the appellants. May be that Gitan Devi (PW-4) and some other local witnesses have not supported the prosecution version to help the appellants, who hail from the same area as the said witnesses whereas the prosecutrix is a poor lady from a remote village of Mandi District though adjoining the District of Kangra in the area of which the incident took place.

18. As a result of the above discussion, we hold that all the five appeals are without merit. Hence the same are dismissed.

(Surjit Singh)
Judge

(Dev Darshan Sud)
Judge

March _____, 2007 (BC)

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JUDGMENT FOR CONSIDERATION, PLEASE.

(Surjit Singh), J.

I agree / do not agree.

(Dev Darshan Sud), J.

List for pronouncement of judgment on _____

(Surjit Singh), J.

Court Secretary

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